

STATUS OF PENDING EN BANC CASES

Today's Date: September 18, 2006

This report is provided for case identification and background information only and does not reflect the views of the court. When a case is heard or reheard en banc, the en banc court assumes jurisdiction over the entire case, see 28 U.S.C. § 46(c), regardless of the issue or issues that may have caused any member of the Court to vote to hear the case en banc. Summerlin v. Stewart, 309 F.3d 1193 (9th Cir. 2002)

Fields v. Brown, 00-99005 / 00-99006

Three-Judge Panel Opinion: 431 F.3d 1186 (9th Cir. 2005)

Order Taking Case En Banc: 2006 WL (9th Cir. September 21, 2006)

Date of Order Taking Case En Banc: September 21, 2006

Status: Not yet calendared

Members of En Banc Court: Not yet available

Subject Matter: Death penalty habeas corpus appeal.

Holding: Not yet decided.

United States v. Lopez, 05-50415

Three-Judge Panel Opinion: None

Order Taking Case En Banc: 2006 WL (9th Cir. September 11, 2006)

Date of Order Taking Case En Banc: September 11, 2006

Status: Calendared December 12, 2006, 3:00 p.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: The parties were ordered to file briefs regarding whether this case should be taken en banc to resolve a conflict between *United States v. Gonzalez-Torres*, 309 F.3d 599 (9th Cir. 2002) (holding that the crime of bringing aliens to the United States is complete once the alien crosses the border), and *United States v. Ramirez-Martinez*, 273 F.3d 903 (9th Cir. 2001) (holding that the crime of bringing aliens is not complete until the alien reaches his immediate destination in the United States).

Holding: Not yet decided.

United States v. Carty, 05-10200

Three-Judge Panel Opinion: 453 F.3d 1214 (9th Cir. 2006)

United States v. Zavala, 05-30120

Three-Judge Panel Opinion: 443 F.3d 1165 (9th Cir. 2006)

Order Taking Cases En Banc: 2006 WL 2474346 (9th Cir. August 23, 2006)

Date of Order Taking Cases En Banc: August 23, 2006

Status: Calendared October 6, 2006, 8:30 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeals of the sentences imposed by district courts following criminal convictions.

Holding: Not yet decided.

United States v. Heredia, 03-10585

Three-Judge Panel Opinion: 429 F.3d 820 (9th Cir. 2005)

Order Taking Case En Banc: 2006 WL 2358019 (9th Cir. August 11, 2006)

Date of Order Taking Case En Banc: August 11, 2006

Status: Calendared December 12, 2006, 11:00 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal of conviction for possessing contraband with intent to distribute.

Holding: Not yet decided.

United States v. Novak, 04-55838

Three-Judge Panel Opinion: 441 F.3d 819 (9th Cir. 2006)

Order Taking Case En Banc: 457 F.3d 981 (9th Cir. 2006)

Date of Order Taking Case En Banc: August 1, 2006

Status: Calendared October 3, 2006, 11:00 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal brought by the United States from the district court's order quashing a writ of garnishment for a criminal defendant's pension assets.

Holding: Not yet decided.

United States v. Curtin, 04-10632

Three-Judge Panel Opinion: 443 F.3d 1084 (9th Cir. 2006)

Order Taking Case En Banc: 455 F.3d 1052 (9th Cir. 2006)

Date of Order Taking Case En Banc: July 28, 2006

Status: Calendared October 3, 2006, 11:00 a.m., San Francisco.

Members of En Banc Court: Not yet available

Subject Matter: Appeal of conviction for traveling across state lines with intent to engage in a sexual act with a minor and use of an interstate facility to attempt to persuade a minor to engage in sex.

Holding: Not yet decided.

Hulteen v. AT&T Corporation, 04-16087

Three-Judge Panel Opinion: 441 F.3d 653 (9th Cir. 2006)

Order Taking Case En Banc: 455 F.3d 973 (9th Cir. 2006)

Date of Order Taking Case En Banc: July 19, 2006

Status: Calendared October 4, 2006, 3:00 p.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal of the district court's summary judgment in action for violation of Title VII, as amended by the Pregnancy Discrimination Act of 1978.

Holding: Not yet decided.

Edwards v. Lamarque, 04-55752

Three-Judge Panel Opinion: 439 F.3d 504 (9th Cir. 2005)

Order Taking Case En Banc: 455 F.3d 973 (9th Cir. 2006)

Date of Order Taking Case En Banc: July 19, 2006

Status: Calendared October 5, 2006, 3:00 p.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal of the district court's order granting a 28 U.S.C. § 2254 habeas corpus petition challenging a murder conviction.

Holding: Not yet decided.

United States v. Vidal, 04-50185

Three-Judge Panel Opinion: 426 F.3d 1011 (9th Cir. 2005)

Order Taking Case En Banc: 453 F.3d 1114 (9th Cir. 2006)

Date of Order Taking Case En Banc: June 29, 2006

Status: Calendared October 5, 2006, 11:00 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal of district court's finding that defendant's conviction for the unlawful taking of a vehicle, in violation of California Vehicle Code § 10851(a), constitutes an aggravated felony for purposes of Sentencing Guidelines enhancement.

Holding: Not yet decided.

Lolong v. Gonzales, 03-72384

Three-Judge Panel Opinion: 400 F.3d 1215 (9th Cir. 2005)

Order Taking Case En Banc: 452 F.3d 1027 (9th Cir. 2006)

Date of Order Taking Case En Banc: June 19, 2006

Status: Calendared October 5, 2006, 8:30 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Petition for review of the Board of Immigration Appeals' reversal of an Immigration Judge's decision granting asylum to Indonesian alien of Chinese ethnicity.

Holding: Not yet decided.

Padilla v. Lever, 03-56259

Three-Judge Panel Opinion: 429 F.3d 910 (9th Cir. 2005)

Order Taking Case En Banc: 446 F.3d 963 (9th Cir. 2006)

Date of Order Taking Case En Banc: April 20, 2006

Status: Affirmed district court's judgment dismissal of Voting Rights Act lawsuit.

En Banc Order: 2006 WL 2671059 (9th Cir. September 19, 2006)

Date of En Banc Order: September 19, 2006

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, William C. Canby, Stephen R. Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Jay S. Bybee, Carlos T. Bea.

Subject Matter: Appeal of district court's dismissal of a Voting Rights Act suit by residents and voters in the Santa Ana Unified School District seeking declaratory and injunctive relief against county elections officials in charge of overseeing the recall election process in the school district because the officials failed to ensure that recall petitions were provided in Spanish as well as English.

Holding: A provision of the Voting Rights Act requiring materials relating to the electoral process to be provided in minority languages in certain states with substantial linguistic minority populations does not apply to recall petitions initiated, circulated, and paid for by private proponents of a recall because the petitions are not "provided" by the state or its subdivision.

Doe v. Kamehameha Schools, 04-15044

Three-Judge Panel Opinion: 416 F.3d 1025 (9th Cir. 2005)

Order Taking Case En Banc: 441 F.3d 1029 (9th Cir. 2006)

Date of Order Taking Case En Banc: February 22, 2006

Status: Argued and submitted June 20, 2006.

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Susan P. Graber, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan

Subject Matter: Appeal of district court's summary judgment in 42 U.S.C. § 1981 action brought by a non-native Hawaiian student challenging a private school's

admissions policy of accepting only students of native ancestry.

Holding: Not yet decided.

Abatie v. Alta Health, 03-55601

Three-Judge Panel Opinion: 421 F.3d 1053 (9th Cir. 2005)

Order Taking Case En Banc: 437 F.3d 860 (9th Cir. 2006)

Date of Order Taking Case En Banc: February 6, 2006

Status: Reversed district court's judgment, and remanded. Mandate issued September 6, 2006.

En Banc Order: 458 F.3d 958 (9th Cir. 2006)

Date of En Banc Order: August 15, 2006

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Barry G. Silverman, Susan P. Graber, M.M. McKeown, Kim M. Wardlaw, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan

Subject Matter: Appeal of district court's bench trial judgment dismissing an action under ERISA, 29 U.S.C. § 1001 et seq., and state law seeking life insurance and disability payments.

Holding: In action challenging an ERISA plan administrator's denial of life insurance benefits, if the wording of the plan confers discretion and the administrator has a conflict of interest, abuse of discretion review applies. When a decision by a plan administrator fails to follow applicable procedures, the administrator is not exercising discretionary powers under the plan, and de novo review applies. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995), is overruled, as conflicting with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Perez-Enriquez v. Gonzales, 03-70244

Three-Judge Panel Opinion: 411 F.3d 1079 (9th Cir. 2005)

Order Taking Case En Banc: 436 F.3d 1097 (9th Cir. 2006)

Date of Order Taking Case En Banc: January 30, 2006

Status: Granted petition for review of the decision finding petitioner statutorily inadmissible.

En Banc Order: 2006 WL 2640530 (9th Cir. September 15, 2006)

Date of En Banc Order: September 15, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Sidney R. Thomas, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard

A. Paez, Marsha S. Berzon, Richard C. Tallman, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan

Subject Matter: Petition for review of the Board of Immigration Appeals' affirmance of an Immigration Judge's finding that a lawful permanent resident was inadmissible due to his drug conviction.

Holding: Admissibility for an agricultural worker under the Special Agricultural Worker program is determined as of the date of adjustment of status to lawful permanent resident under 8 U.S.C. § 1160(a)(1), and is not redetermined as of the date of automatic adjustment of status to lawful permanent resident under § 1160(a)(2).

Chamber of Commerce v. Lockyer, 03-55166 / 03-55169

Three-Judge Panel Opinion: 422 F.3d 973 (9th Cir. 2005)

Order Taking Case En Banc: 435 F.3d 999 (9th Cir. 2006)

Date of Order Taking Case En Banc: January 17, 2006

Status: Reversed the district court's summary judgment and vacated its injunction prohibiting enforcement of California Assembly Bill 1889 (AB 1889).

En Banc Order: 2006 WL 2699472 (9th Cir. September 21, 2006)

Date of En Banc Order: September 21, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Robert R. Beezer, Alex Kozinski, Andrew J. Kleinfeld, Michael D. Hawkins, Sidney R. Thomas, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, Raymond C. Fisher, Richard A. Paez, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan

Subject Matter: Whether AB 1889, which bars employers from spending "state funds" on union-related speech, is preempted by the National Labor Relations Act.

Holding: The Bill does not undermine federal labor policy, is not preempted by the National Labor Relations Act, and does not violate the First Amendment.

Bradley v. Henry, 04-15919

Three-Judge Panel Opinion: 428 F.3d 811 (9th Cir. 2005)

Order Taking Case En Banc: 432 F.3d 938 (9th Cir. 2005)

Date of Order Taking Case En Banc: December 15, 2005

Status: The order scheduling the case for argument before the en banc court was vacated, and en banc proceedings are suspended pending the Supreme Court's decision in *United States v. Gonzalez-Lopez*, 399 F.3d 924 (8th Cir. 2005), cert. granted, 2006 WL 36747 (U.S. 1/6/06).

Members of En Banc Court: Not yet available

Subject Matter: Appeal of the district court's denial of a 28 U.S.C. § 2254 habeas

corpus petition challenging a first degree murder conviction.

Holding: Not yet decided.

Fernandez-Ruiz v. Gonzales, 03-74533

Three-Judge Panel Opinion: 410 F.3d 585 (9th Cir. 2005)

Order Taking Case En Banc: 431 F.3d 1212 (9th Cir. 2005)

Date of Order Taking Case En Banc: December 13, 2005

Status: Argued and submitted March 21, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Alex Kozinski, John T. Noonan, Diarmuid F. O'Scannlain, Michael D. Hawkins, Kim M. Wardlaw, Richard R. Clifton, Jay S. Bybee, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Petition for review of the Board of Immigration Appeals' affirmance of an Immigration Judge's decision rescinding lawful permanent resident status and removal order.

Holding: Not yet decided.

Kesser v. Cambra, 02-15475

Leahy v. Farmon, 01-17467

Three-Judge Panel Opinion: Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2003)

Order Taking Cases En Banc: 425 F.3d 1230 (9th Cir. 2005)

Date of Order Taking Cases En Banc: October 14, 2005

Status: Reversed the district court's judgment and granted the writ of habeas corpus.

En Banc Order: 2006 WL 2589425 (9th Cir. September 11, 2006)

Date of En Banc Order: September 11, 2006

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Kim M. Wardlaw, Richard A. Paez, Marsha S. Berzon, Jay S. Bybee, Carlos T. Bea

Subject Matter: Appeals of denials of habeas corpus petitions involving rejection of jury challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Holding: In light of *Miller-El v. Dretke*, 545 U.S. 231 (2005), the state court's findings regarding the prosecutor's use of peremptory challenges to strike three Native American women and one Asian woman from the jury in a murder trial was an unreasonable determination of the facts in light of the evidence presented.

Morales-Izquierdo v. Gonzales, 03-70674

United States v. USDC, 06-73622

Three-Judge Panel Opinion: 388 F.3d 1299 (9th Cir. 2004)

Order Taking Case En Banc: 423 F.3d 1118 (9th Cir. 2005)

Date of Order Taking Case En Banc: September 12, 2005

Status: Argued and submitted December 13, 2005. En banc proceedings stayed. Stay vacated and case resubmitted for decision as of June 22, 2006. New docket opened, *United States v. USDC*, 06-73622, and all papers pertaining to the government's mandamus petition are transferred to that docket. The two cases are ordered consolidated.

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Alex Kozinski, Pamela A. Rymer, Michael D. Hawkins, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Ronald M. Gould, Jay S. Bybee

Subject Matter: Petition for review challenging reinstatement of prior deportation order under 8 C.F.R. § 241.8, the Attorney General's amended reinstatement procedure, as *ultra vires* to Immigration and Naturalization Act § 240(a).

Holding: Not yet decided.

United States v. Gourde, 03-30262

Three-Judge Panel Opinion: 382 F.3d 1003 (9th Cir. 2004)

Order Taking Case En Banc: 416 F.3d 961 (9th Cir. 2005)

Date of Order Taking Case En Banc: July 14, 2005

Status: Affirmed conviction for possession of visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2), and 2256, and remanded to the three-judge panel for consideration of the defendant's request for a limited remand under *United States v. Ameline*. Mandate issued May 8, 2006. Certiorari notice received.

En Banc Order: 440 F.3d 1065 (9th Cir. 2006)

Date of En Banc Order: March 9, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Melvin Brunetti, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, M.M. McKeown, Ronald M. Gould, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Appeal of district court's denial of a motion to suppress images seized from the defendant's computer following which he entered a conditional guilty plea to possession of visual depictions of minors engaged in sexually explicit conduct.

Holding: Affidavit in support of application for a warrant to search defendant's home computer contained sufficient facts to support a magistrate judge's finding that there was a "fair probability" that the computer contained evidence that the defendant violated 18 U.S.C. §§ 2252 or 2252A, given that the reasonable

inference from solid facts, that the defendant received or downloaded images, easily meets the “fair probability” test of *Illinois v. Gates*, 462 U.S. 213, 246 (1983).

Nagrampa v. MailCoups, Inc., 03-15955

Three-Judge Panel Opinion: 401 F.3d 1024 (9th Cir. 2005)

Order Taking Case En Banc: 413 F.3d 1024 (9th Cir. 2005)

Date of Order Taking Case En Banc: June 28, 2005

Status: Argued and submitted September 27, 2005.

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Sidney R. Thomas, Susan P. Graber, Kim M. Wardlaw, Raymond C. Fisher, Ronald M. Gould, Richard C. Tallman, Richard R. Clifton

Subject Matter: Appeal of district court's dismissal of a diversity action as barred by the arbitration clause in the parties' franchise agreement.

Holding: Not yet decided.

Landrigan v. Schriro, 00-99011

Three-Judge Panel Opinion: 272 F.3d 1221 (9th Cir. 2004)

Order Taking Case En Banc: 397 F.3d 1235 (9th Cir. 2005)

Date of Order Taking Case En Banc: February 14, 2005

Status: Argued and submitted March 24, 2005. Submission withdrawn pending the en banc disposition of *Summerlin v. Schriro*, 98-99002. Resubmitted as of March 1, 2006. Affirmed in part and reversed and remanded in part the district court's denial of habeas corpus petition in death penalty case. Mandate issued May 8, 2006. Certiorari notice received.

En Banc Order: 441 F.3d 638 (9th Cir. 2006)

Date of En Banc Order: March 8, 2006

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Alex Kozinski, Michael D. Hawkins, Kim M. Wardlaw, William A. Fletcher, Marsha S. Berzon, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Death penalty habeas corpus appeal.

Holding: Appellant demonstrated a colorable claim of ineffective assistance of counsel during the penalty phase. Appellant did not waive the opportunity to bring forth mitigating evidence because trial counsel had not made appellant aware there was other mitigating evidence that could have been presented.

Barapind v. Enomoto, 02-16944

Three-Judge Panel Opinion: 360 F.3d 1061 (9th Cir. 2004)

Order Taking Case En Banc: 391 F.3d 867 (9th Cir. 2004)

Date of Order Taking Case En Banc: August 23, 2004

Status: Affirmed in part and reversed in part district court's denial of a habeas petition challenging the certification of India's request to extradite petitioner. Mandate issued May 12, 2005. Supreme Court granted application for an extension of time to file a petition for a writ of certiorari.

En Banc Order: 400 F.3d 744 (9th Cir. 2005)

Date of En Banc Order: March 9, 2005

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, Pamela A. Rymer, Andrew J. Kleinfeld, Michael D. Hawkins, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Richard C. Tallman, Johnnie B. Rawlinson, Consuelo M. Callahan

Subject Matter: Whether the "political offense" exception to extradition applies to a member of the All India Sikh Student Federation charged with the multiple murders of government agents in India.

Holding: For a crime to be a non-extraditable political offense under the extradition treaty with India, there must be an uprising or other violent political disturbance, and the offense must be incidental to, in the course of, or in furtherance of the uprising. The extradition court erred in finding that it was not bound by this court's holding in *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986). The extradition court did not err in finding that a murder charge was not political where the petitioner failed to submit evidence to explain the motive for the murder.

Lombardo v. Warner, 02-35269

Three-Judge Panel Opinion: 353 F.3d 774 (9th Cir. 2003)

Order Taking Case En Banc: 371 F.3d 538 (9th Cir. 2004)

Date of Order Taking Case En Banc: June 4, 2004

Status: Argued and submitted October 12, 2004. En banc court certified two questions to the Oregon Supreme Court. Submission of the case for decision is vacated and deferred pending the Oregon Supreme Court's final response to this certification order and that court's decision in the Outdoor Media Dimensions cases.

Members of En Banc Court: Mary M. Schroeder, Warren J. Ferguson, Andrew J. Kleinfeld, A.W. Tashima, Sidney R. Thomas, M.M. McKeown, Kim M. Wardlaw, Raymond C. Fisher, Marsha S. Berzon, Richard R. Clifton, Jay S. Bybee

Subject Matter: Are highway billboard provisions of the Oregon Motorist

Information Act ("OMIA") unconstitutional as a content-based regulation that favors commercial over non-commercial speech, or because the OMIA vests unbridled discretion in state officials and lacks necessary procedural safeguards?

The en banc court certified to the Oregon Supreme Court the following questions: 1. What is the meaning of the phrase "for good cause shown" as it appears in § 377.735(2)? 2. Does Oregon law supply any time limitations on the Department of Transportation acting on application for a variance under § 377.735(2)?

Holding: Not yet decided

Cooper v. Woodford, 04-70578

Three-Judge Panel Opinion: 357 F.3d 1019 (9th Cir. 2004)

Order Taking Case En Banc: 357 F.3d 1054 (9th Cir. 2004)

Date of Order Taking Case En Banc: February 9, 2004

Status: Granted capital prisoner's application to file a second or successive application for habeas corpus in the district court; ordered execution stayed pending result of the application. Mandate issued March 2, 2004. Received notice of petition for certiorari filed with Supreme Court.

En Banc Order: 358 F.3d 1117 (9th Cir. 2004)

Date of En Banc Order: February 9, 2004

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, A.W. Tashima, Barry G. Silverman, Susan P. Graber, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard C. Tallman, Johnnie B. Rawlinson, Jay S. Bybee

Subject Matter: Whether Cooper should be permitted to file a second or successive petition for a writ of habeas corpus in the district court.

Holding: Cooper is entitled to file a second or successive application, because he made a prima facie case of success on the merits of his claim that it is more likely than not that no reasonable fact finder would have found him guilty.